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The advocates of the doctrine known as Christian Science will find much of interest, and also comfort, in the decision of the case of State v. Mylod by the Supreme Court of Rhode Island. The question was there presented whether one who was a teacher of that doctrine and who, for a consideration, undertook to cure diseases by means of thought and silent prayer, without making any examination or diagnosis of the patient's condition, and without the use of drug, medicine or surgical methods, was guilty of practicing medicine within the terms of a statute making it unlawful to so practice without license and authority. The court, in a lucid and logical opinion, held in the negative. Medicine, they say, in the popular sense, is a remedial substance. The practice of medicine, as ordinarily or popularly understood, has relation to the art of preventing, curing or alleviating disease or pain. It rests largely in the sciences of anatomy, physiology and hygiene. It requires a knowledge of disease, its origin, its anatomical and physiological features, and its causative relations; and further, it requires a knowledge of drugs, their preparation and action. Popularly, it consists in the discovery of the cause and nature of disease and the administration of remedies or the prescribing of treatment therefor. Prayer for those suffering from disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be attained as a result of prayer, or that humanity will be brought into harmony with God by right thinking and a fixed determination to look on the bright side of life, does not constitute the practice of medicine in the popular sense. The court went further, however, and held that the term "practice of medicine," as used in the statute, is not enlarged by another section providing that to open an office for that purpose or to announce in any way a readiness to practice medicine shall be to engage in the practice thereof nor by another section which provides that nothing in the act shall be so construed as to discriminate against any particular system of medicine. A number of cases relied upon by the State as justifying conviction were reviewed and distinguished by the court. In Wheeler v. Sawyer (Me.), 15 Atl. Rep. 67, the plaintiff, a Christian Scientist, brought suit to recover for services. The court said: "We are not required here to investigate Christian Science. The defendant's intestate chose that treatment. There is nothing unlawful or immoral in such a contract. Its wisdom or folly is for the parties, not for the court, to determine." In State v. Buswell, 40 Neb. 158, 58 N. W. Rep. 728, the defendant was indicted for the unlawful practice of medicine. In Nebraska, the practice of medicine, surgery, and obstetrics is prohibited except by persons possessing certain qualifications. The defendant was a Christian Scientist, and the evidence against him upon which the State relied was similar in character to that in the Rhode Island case. The trial court instructed the jury that, in order to convict the defendant, they must find that the defendant had practiced medicine, surgery or obstetrics, as those terms are usually and generally understood, and the State excepted. The supreme court, in sustaining the exception, uses the following language: "Governed by the instruction, the jury could not do otherwise than to acquit, for there was no proof to meet its requirements." Again: "The statute does not merely give a new definition to language having already a given and fixed meaning. It rather creates a new class of offenses, in clear and unambiguous language, which should be interpreted and enforced according to its terms." Again: "Under the indictment the sole question presented upon the evidence was whether or not the defendant, within the time charged, had operated on or professed to heal or prescribed for, or otherwise treated, any physical or mental ailment of another." The decision of the Nebraska court, therefore, is that while the practice of Christian Science is not a practice of medicine as those terms usually and generally are understood, yet that, under the section above quoted, the practice of Christian Science, being a treatment for physical or mental ailments, is a violation of the law. In Missouri the statute requires that before a person may lawfully practice medicine or surgery he must file a copy of his diploma with the clerk of the

county court, and it further provides that any person not qualified, who shall practice medicine or surgery, shall not be permitted to recover compensation for services rendered "as any such physician or surgeon." In Davidson v. Bohlman, 37 Mo. App. 576, the plaintiff having brought suit to recover for services, the question raised was whether the services were performed by the plaintiff as a physician. The plaintiff had practiced medicine lawfully for nearly thirty years, first as an allopathic physician and later as an electric physician. He had a diploma from an electric medical college, but had failed to file a copy of it as required by law. The services for which he claimed compensation consisted of electric treatment. The Court of Appeals, upon the testimony, held that the services were performed by the plaintiff as a physician, and that not being qualified to practice, he could not recover.

In the Rhode Island case considerable stress was laid by the prosecution upon the fact that the defendant assumed the title of "doctor," but the court held that this was not unlawful. Its use, they say, is entirely immaterial in any case, unless under such conditions or circumstances, or in such connection that it may serve as an announcement or indication of a readiness to engage in the practice of medicine or surgery.

The object of such statutes undoubtedly is to secure the safety and protect the health of the public. It is based upon the assumption that to allow incompetent persons to determine the nature of disease and to prescribe remedies therefor would result in injury and loss of life. To protect the public, not from theories, but from the acts of incompetent persons, legislatures have prescribed the qualifications of those who may be entitled to perform the important duties of medical practitioners. The statute is not for the purpose of compelling persons suffering from disease to resort to remedies, but is designed to secure to those desiring remedies competent physicians to prepare and administer them.

NOTES OF IMPORTANT DECISIONS.

STATUTE OF FRAUDS—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR.—It is decided by the Court of Appeals of Kansas, in Mackey v. Thisler, that a verbal contract respecting personal property is not within the provision of the statute of frauds and perjuries if all that is to be done upon the part of one of the parties thereto is to be performed, and is performed, within a year from the making thereof, notwithstanding by its provisions performance on the other part is not to be within the year, and that if an entire contract is within the statute of frauds and perjuries, every covenant, promise or obligation being part thereof is within the statute, and no action can be founded thereon. The court says in part: "It is conteded that, inasmuch as the contract upon the part of the defendants was wholly executed by the defendants upon their part, and was to be executed by them upon their part, within the year, the case comes within the rule announced in 8 Am. & Eng. Enc. Law, 692, which is, in effect, that this statute applies only to contracts which are not to be performed on either side within a year; that, if all that is to be performed on one side is to be performed within a year, and is performed within a year, the contract is not within the statutes. This rule had its foundation apparently in the case of Donellan v. Read, 3 Barn. & Adol. 899. This rule has not been universally accepted in this country, but it seems that it has been adopted by the greater number of the States of the Union. It seems to us that our own supreme court has adopted and approved the rule in the case of Railroad Co. v. English, 38 Kan. 110, 16 Pac. Rep. 82. In this case defendants had fully performed the contract upon their part. It appears from the evidence of the defendants that the contract was entire; that part of it whereby the plaintiffs agreed to take the horse back, and surrender the consideration, and pay the additional $100, being the principal inducement to the defendants for their purchase. The weight of authority in this country is in favor of this rule, and, if allowed to prevail, the court erred in sustaining the demurrer upon this ground. In Railroad Co. v. English, *supra*, the Supreme Court of this State says: 'This contract was also performed within one year upon the part of plaintiff, and the defendant cannot claim protection under the statute of frauds. Its protection extends to executory contracts, and does not apply to contracts that have been executed by one party;' and then quotes from Mr. Wood, in his treatise on the Statute of Frauds (section 279), as follows: 'In England and most of the States of this country it is held that the statute only applies to contracts which are not to be performed by either side within a year, and therefore, where a contract has been completely performed on one side within the year, the case will not come within the statute;' and cites various authorities in support of the proposition. To this array of authorities may be added cases from nearly all of the States in the Union except Massachusetts, Vermont, Mississippi and Ohio. In New Hampshire the rule has been both adopted and criticised. We are of the opinion that this rule obtains in the State of Kansas. See, also, Smalley v. Greene, 52 Iowa, 244, 3 N. W. Rep. 78. If we

leave out of consideration the rule in Donellan v. Read, the judgment of the court is equally untenable, assuming that part of the contention of plaintiffs (defendants in error) to be correct that the contract does come within the inhibition of the statute of frauds and perjuries. Assuming that it does, then neither party can avail himself of it as a ground of action if we assume that the contract is an entire one, and that the defendants in error are wrong in their contention that the contract to take the horse back and refund the consideration of purchase and pay the additional $100 was an independent contract, and not a part of the original contract of purchase and sale. The plaintiffs are seeking to enforce an obligation founded upon a contract which the statute says shall not afford any ground of action. The defendants set this illegal part of the contract up as a defense. It is true, they have a prayer for relief, asking the enforcement of the contract. But the plaintiffs say this part of the contract is illegal; cannot be enforced; and, if one part of an entire contract remaining in executory form cannot be enforced, no part of it can. Browne, St. Frauds, § 144; Becker v. Mason, 30 Kan. 702, 703, 2 Pac. Rep. 850, and authorities there cited; Howard v. Brower, 37 Ohio St. 407. The defendants in error, however, contend, first, that this evidence was incompetent to go to the jury because of the rule that parol evidence shall not be admitted to extend or vary the terms of a written contract; that there was proof of a written contract of bargain and sale respecting the horse between the parties. This is not presented upon the record. There is nothing therein to show that the contract was in writing. They next contend that this rule ought not to apply, because that part of the contract set up by the defendants in their answer was an independent agreement, and not a part of the original contract of purchase and sale; that, therefore, the contract of purchase and sale may be enforced independently of that part relied upon by the defendants as a defense. The court had no right to assume this proposition in sustaining the demurrer to the defendants' evidence. Every intendment of the evidence favorable to the defense must be allowed them. All inference that the jury might reasonably draw from the facts proved they should be given the benefit of."

MORTGAGE — ASSUMPTION — LIABILITY FOR DEFICIENCY.—In Hicks v. Hamilton, 46 S. W. Rep. 432, decided by the Supreme Court of Missouri, it was held that a grantee of mortgaged premises, whose conveyance recites that he assumes and agrees to pay the mortgage debt, is not liable for a deficiency arising on a foreclosure of the mortgage, where his grantor was not liable. The court said in part: "Plaintiff held a note secured by a deed of trust upon a lot in Kansas City, belonging to one Clark, the maker of the note. Clark conveyed the property, subject to said deed of trust, to Cowling, but without any assumption by the latter of the mortgage debt. Cowling subsequently transferred said real estate, by warranty deed, to defendant. This deed contains a clause stating that the grantee therein 'assumes and agrees to pay' said debt. The property, after the conveyance to defendant, was sold under the deed of trust. There was not enough realized to pay plaintiff's note, and, after crediting thereon the proceeds of the sale, he brought this suit to recover the deficiency from the defendant, on the ground that, by accepting the deed from Cowling, defendant assumed and agreed to pay said debt.

"Can plaintiff recover upon defendant's implied promise raised by his acceptance of Cowling's deed, containing a clause binding defendant to assume and pay the mortgage debt? It is well settled that 'a person for whose benefit an express promise is made in a valid contract between others may in this State maintain an action thereon in his own name. Ellis v. Harrison, 104 Mo. 270, 16 S. W. Rep. 198, and cases cited. The agreement between the promisor and promisee must possess the necessary elements to make it a binding obligation; in other words, it must be a valid contract between the parties to enable a third person, for whose benefit the promise is made, to sue upon it. A mere naked promise from one to another for the benefit of a third will not sustain an action. Cowling, defendant's grantor, did not owe the mortgage debt, and had never assumed to pay it. Defendant's promise was not, therefore, to indemnify him. As Judge Smith well says: 'It must be borne in mind that plaintiff's debt was no part of the consideration for the grant from Cowling to the defendant. Cowling conveyed to the defendant his equity of redemption. He had no other or greater interest in the property. The assumption was, therefore, without semblance of a consideration passing from Cowling to the defendant. It was an independent promise, unsupported by any consideration whatever.' It is said in the notes to King v. Whitely, 4 Lawy. Ed., N. Y. Ch. 1052: 'Unless the grantor is personally liable for the debt, the promise of the grantee, the purchaser is held to be a mere *nudum pactum*, and, of course, without efficacy in favor of either the grantor or mortgagee.' The court in Norwood v. De Hart, 30 N. J. Eq. 412, held that 'a mortgagee cannot avail himself of an assumption to pay his mortgage contained in a deed to a subsequent purchaser unless the grantor was personally liable to pay the debt.' Jefferson v. Asch (Minn.), 55 N. W. Rep. 604; Morris v. Mix (Kan. App.), 46 Pac. Rep. 58; Nelson v. Rogers (Minn.), 49 N. W. Rep. 526; Vrooman v. Turner, 69 N. Y. 280; Osborne v. Cabell, 77 Va. 462. The liability of a grantee of real estate, who has assumed the payment of a mortgage debt upon it, is sometimes placed upon the doctrine of subrogation. The mortgagee is declared to be entitled to enforce for his benefit 'all collateral obligations for the payment of the debt, which a person standing in the situation of surety has received for his benefit.'

As between the parties to the deed, the grantor becomes the surety, and the grantee the principal debtor. Of course, no such rule could obtain where the grantor was not, and had never become, bound for the debt. If plaintiff is to rest his case upon the proposition that he can recover upon the promise of defendant to Cowling as made, for his benefit, he is met by the objection that this was without consideration to support it, and that Cowling was in no manner indebted to or connected with plaintiff, and bore no such relation to him as would give Cowling any interest in having the assumption clause in the deed. Vrooman v. Turner, 69 N. Y. 280, involved precisely the same question that is presented in the case at bar. It was ruled that 'a grantee of mortgaged premises, whose conveyance recites that the land is subject to the mortgage, and that the grantee assumes and agrees to pay the same as part of the consideration, is not liable for a deficiency arising upon a foreclosure and sale, in case the grantor was not personally liable, legally or equitably, for the payment of the mortgage.' This court has in several recent opinions cited and approved that case, Howsmon v. Water Co., 119 Mo. 304, 24 S. W. Rep. 784; Pipe Co. v. Thompson, 120 Mo. 218, 25 S. W. Rep. 522; also Phœnix Ins. Co. v. Trenton Water Co., 42 Mo. App. 118. In Pipe Co. v. Thompson, *supra*, Gantt, C. J., indorsed the following quotation from said opinion: 'To give a third party, who may derive a benefit from the performance of the promise, an action, there must be—First, an intent of the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. * * * A mere stranger cannot intervene and claim by action the benefit of a contract between other parties.' There are decisions in some of the States which sustain plaintiff's position, but the cases which have heretofore been followed by this court, as well, we think, as the better reason and the weight of authority, are to the contrary."

CRIMINAL LAW—HOMICIDE—INFANT CHILD—MURDER IN SECOND DEGREE.—In Clarke v. State, 23 South. Rep. 671, decided by the Supreme Court of Alabama, it was held that where a child born alive afterwards dies by reason of bruises inflicted on it, before birth, by the beating of its mother, the offense is murder. It was further held that in a prosecution for murder, where there was no express malice shown, but where there were acts from which malice is implied, it was not error to limit the jury to the consideration of murder in the second degree. The court said: "The gravamen, an indispensable constituent of the offense charged in the indictment, is the unlawful beating of the mother while pregnant, causing the death of the child after birth. Though not alleged in the indictment, the fact was shown by the evidence that she was, at and prior to the beating, the wife of the defendant, and the next question for consideration is her competency as a witness for the defendant. In relation to the competency of husband and wife as witnesses for or against each other in criminal cases or proceedings, we have no statute which changes or modifies the common law. By the common law, in all cases of personal injuries committed by husband or wife against each other, the injured party is an admissible witness against the other. 1 Greenl. Ev., sec. 343; 1 Bish. New Cr. Proc., secs. 1151-1155; Whart. Cr. Ev., sec. 393, *et seq.* This exception to the general rule excluding husband and wife as witnesses for or against each other, it may be, originally grew out of a supposed necessity of the protection of the wife against personal violence, threatened or actual, by the husband. Whatever may have been the origin of the exception, it is now recognized as extending to all cases in which the element of personal violence to the wife is a necessary constituent of the offense. State v. Dyer, 59 Me. 303. The case cited was an indictment against the husband and another for using an instrument with intent to procure the miscarriage of the wife while pregnant, and is not, in reason or principle, distinguishable from the present case. Wherever the element of personal violence is a necessary constituent of the offense, every reason exists upon which the exception rested originally, and for the sake of public justice the wife should be admitted as a witness. And in all cases in which she is admissible against, she is admissible for, the husband. Whart. Cr. Ev., sec. 394a; Com. v. Murphy, 4 Allen, 491; State v. Neill, 6 Ala. 685; Tucker v. State, 71 Ala. 342. The court below erred in the exclusion of the wife as a witness.

"Murder was defined or described by Lord Coke in these words: 'When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, express or implied.' The definition or description was adopted by Blackstone, and in commenting upon the phrase, 'reasonable creature in being,' it was said: 'To kill a child in the mother's womb is now no murder, but a great misprison; but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.' 2 Cooley, Bl. 197. In 3 Russ. Crimes (6th Ed.), 6, it is said: 'An infant in its mother's womb, not being *in rerum natura*, is not considered as a person who can be killed, within the description of murder; and therefore, if a woman, being quick or great with child, take any potion to cause abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter.' Further it is said: 'When a child, having been born alive, afterwards died by reason of any potion or bruises it received in the womb, it seems always to have been the better opinion that it was

murder in such as administered or gave them.' The same doctrine is stated in 1 Whart. Cr. Law (9th Ed.). sec. 445. Whart. Hom., sec. 303; 2 Bish. Cr. Law, sec. 633. The offense is murder, not manslaughter, upon the settled principle of the common law, that where death ensues from an act done without lawful purpose, dangerous to life, malice, the essential ingredient of murder, is implied. Com. v. Parker, 9 Metc. (Mass.) 263-265; State v. Moore, 25 Iowa, 134; 1 Whart. Cr. Law (9th Ed.), sec. 316; 1 Bish. Cr. Law, sec. 328, *et seq.*

"The court below very properly limited the instructions to the jury to the determination of whether the offense was murder in the second degree. There was an absence of all evidence of express malice—of all evidence that the alleged beating of the wife was with an intent to take life, and, of consequence, an exclusion of the characteristics of murder in the first degree. If the beating was inflicted, it was unlawful, dangerous to the life of the mother, an act *malum in se*, from which, as we have said, malice is implied; and implied malice is the distinguishing characteristic of murder in the second degree. 3 Brick. Dig., p. 214, sec. 495. 'Manslaughter is the unlawful and felonious killing of another, without any malice, either express or implied.' Whart. Hom., sec. 4. The code divides manslaughter into degrees, and the first degree is described as the voluntary deprivation of human life. Cr. Code 1896, sec. 4860. The statute is construed in connection with the common law, and it has not been supposed that it enlarged or diminished the elements of the offense as known to the common law. Harrington v. State, 83 Ala. 9, 3 South. Rep. 425; Williams v. State, 83 Ala. 16, 3 South. Rep. 616. The offense not having been committed negligently—if committed at all, perpetrated by an act in itself unlawful, and dangerous to life, from which malice was implied—there was marked propriety in withholding all instructions touching manslaughter. Such instructions would have been abstract. Tested by these principles, the instructions given by the court *ex mero motu*, to which exceptions were reserved, are free from error."

A QUESTION OF LEGISLATIVE POWER.

The vigorous warfare now being carried on by Michigan's governor with the railway companies concerned, serves to divide the attention of the public hereabouts between the same and the question of Spanish duplicity. The more local differences might not be of so much consequence did they not involve questions of grave importance to the whole public. In this age of great corporate interests, built up under the fostering protection of the State, with guaranteed charter rights, some of which were not well understood when granted, and the subsequent acquired amended rights and privileges, sometimes issued as granted by the State, to meet changed conditions, with the natural changing mood of the people, contests like the above referred to between the governor of Michigan and the railroads are bound to occur. The matter involved in this discussion is that of the vested right in the legislature, as the representative body of the people, to regulate its creatures, the corporations, in the transaction of business with the public, and to restrict them within proper bounds by imposing limitations upon their right to charge for such services. And this paper is confined to a discussion of the subject as it concerns the common carrier class of corporations, and more especially to the railroads. We must bear in mind that the legal reason for the existence of these corporations is the public weal. They are chartered and built for the benefit of the public and the profit to the owners, and projectors must be merely incidental. The difficulty seems to arise in determining what are reasonable charges which the railroads may charge for their services, and the right of the legislature to interfere from time to time in regulating these charges where charter rights seem to vest this privilege in the railroad companies. Since the decision of the United States Supreme Court, in the case of Munn v. Illinois,[1] the rule is settled, it would seem, that the legislature of the State has the inherent right to regulate fares and freight charges, certainly to fix the maxium thereof.[2] In the noted New York case,[3] the court says: "Society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce under which the carrying trade of the country is, to a great extent, absorbed by corporations, and as a check upon the greed of these consolidated interests the legislative power of regulation is demanded by imperative public interest. The same principle upon which the control of common carriers rests has enabled the State to regulate in the public interest the

[1] 94 U. S. 113.

[2] See Chicago Ry. Co. v. Iowa, 94 U. S. 155; Ruggles v. Ry. Co., 108 U. S. 526; Peck v. Chicago, 94 U. S. 164; Chicago v. Ackley, *Id.* 179; Covington v. Sanford, 164 U. S. 578.

[3] People v. Budd, 117 N. Y. 22.

charges of telephone and telegraph companies, and to make the telephone and telegraph, these important agencies of commerce, subservient to the wants and necessities of society." The same right of vested power in the legislature to regulate fares and rates of street car companies has been recognized by the courts.[4] The same may be said of canal and ferry companies, toll roads and bridges, telephone and telegraph companies, gas and water companies,[5] and the authority of the legislative body to bestow this power upon a State railroad commission has been upheld by many of the State and federal decisions.[6] There may be said to be practical uniformity in the holding of the courts as to the rule of law where no question of vested charter rights intervenes. And really the merit of this discussion is found in an attempt to determine what right, if any, the legislative power of the State has to interfere and change, or amend, the charters of these common carriers, where such action is not sought by such corporations, but the action of the legislative function is moved by demands of the public. Where the charters of the railroad companies specifically confer power, or privilege, perhaps, is a better term, in the companies to fix rates and charges of transportation over their lines, from time to time, as shall be reasonable and just to the public, there is, of course, room for differences of opinion to arise between the companies and the public. As matters of fact are always involved in determining such conditions, the decisions of the courts, where such cases have come before them, are not entirely harmonious, while the courts are chary about interfering with rates once fixed by legislative sanction.[7] They have in other cases where it appeared that the rates fixed by the legislatures was unreasonable and unjust, held such action unconstitutional.[8] But the federal supreme court has never yet fixed by definite bounds, just what rates will be considered reasonable and what rates unreasonable. But there is a plain intimation by this august body that rates once fixed by legislative action where no unfair or captious policy of adjustment is followed, this court will not interfere to nullify such legislative action. It was held in Munn v. Illinois, *supra*, that rates fixed by legislative authority that will give some compensation, however small, to the railroad company, will be upheld.[9] "Such a rule leaves large power to the legislature, and would sanction statutes which cut down railroad dividends to a mere pittance. But it is hard to see how any other rule can be adopted which will not, in effect, deny the right of the legislature to make regulation of such rates, or else leave little more than a shadow of such power in the legislature, while the real power is assumed by the courts."

The effect of unremunerative rates to be "unreasonable and unjust" must be general to the system, and not apply to mere portions of a system, to obtain this favorable action of the courts in behalf of the railroad companies.[10]

Charter Provisions and Exemptions.—We now come to the matter of special charter provisions under which most of the contests now made by these corporations arise. It is claimed that when the State once grants these rights to a corporation, such as a railroad company, it has no more dominion over such

[4] See Buffalo Ry. Co. v. Buffalo, 111 N. Y. 132; Sternberg v. State, 36 Neb. 307; Parker v. Ry., 109 Mass. 506.

[5] See Perrine v. Canal Co., 9 How. (U. S.) 172; State v. Hudson Co., 23 N. J. L. 206; Stephens v. Powell, 1 Oreg. 283; Parker v. Railroad, *supra*; Covington v. Sanford, 94 Ky. 689, 164, U. S. p. 578; California v. R. Co., 127 U. S. 1; Hockett v. State, 105 Ind. 250; Telephone Co. v. Bradley, 106 *Id.* 1; Tel. Co. v. State, 118 *Id.* 194; Tel. Co. v. B. & O. Telegraph Co., 66 Md. 399.

[6] Reagan v. Trust Co., 154 U. S. 362; Chicago v. Dey, 35 Fed. Rep. 866; Clyde v. Ry., 57 Fed. Rep. 436; Chicago v. Jones, 149 Ill. 361; State v. Chicago, 38 Minn. 281; Stone v. Ry. Co., 62 Miss. 602; Express Co. v. Ry. Co., 111 N. Car. 463; State v. Fremont, 22 Neb. 313; Stern v. Natchez, 62 Miss. 646; Stoors v. Ry. Co., 29 Fla. 617; People v. Budd, *supra;* State v. Edwards, 86 Me. 105; Leovell v. R. Co., 116 N. Car. 211, and the cases there referred to; Zanesville v. Gas Light Co., 47 Ohio St. 1, and cases cited; New Memphis v. Memphis, 72 Fed. Rep. 952; Capital City v. Westmoines, *Id.* 829; State v. Laclede, 102 Mo. 472; State v. Cincinnati, 18 Ohio St. 262; Spring Valley v. Shottler, 110 U. S. 374.

[7] See Munn v. Illinois, 94 U. S., and cases cited; Budd v. New York, 117 N. Y. 22.

[8] Reagan v. Trust Co., 154 U. S. 362; St. Louis v. Gill, 156 U. S. 649.

[9] See also Chicago v. Dey, *supra*.

[10] St. Louis v. Gill, 156 U. S. 649; Missouri v. Smith, 60 Ark. 221. In this latter case, it was held by the court that an act of the legislature of Arkansas, fixing the rates to be charged by the company concerned at sufficient sums to defray current expenses and repairs, and a small profit on the original cost of building the road, could not be interfered with, though not sufficient to pay interest on all indebtedness, as such indebtedness may have been incurred through mismanagement.

matter within the life of such charter. That when once a rate has been fixed by the railroad company in pursuance of its chartered privileges, that rate cannot be changed or modified by legislative action. In other words, that the legislature which made the corporation cannot regulate its charges for doing business with the public after the grant of authority. In the very recent case of Smith v. Lake Shore, etc. Ry. Co.,[11] the Michigan Supreme Court, in a divided opinion, however, held the power inherent in the legislature, under the constitution, to regulate, control and fix the conditions of all contracts between the railroads and the public. The difficulty in defining the precise limit of power reserved to the legislature under provisions incorporated in the charter of such a corporation, and reserving the right to the legislature to alter, amend or repeal, was pointed out by Mr. Justice Montgomery in giving the majority opinion. The majority followed the rule of the court, recently reviewed at length, in Atty.-Gen. v. Looker.[12] Mr. Justice Cooley, speaking of the provisions of the constitution of the United States which forbids the impairing of the obligations of contracts, said in his opinion:[13] "The power to amend and repeal corporate charters would be ample without being expressly reserved but for these provisions. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might, therefore, do what it would be admissible for any constitutional government to do, when not thus restrained. But it could not do what would be inconsistent with constitutional provisions." And this eminent authority further added: "And it cannot be necessary, at this late day, to enter upon discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired." So that much is well settled. But the court in the case above—Smith v. Lake Shore, etc. Ry. Co.—deny the nature of a vested right or property in the use of property dedicated to the public, and point to a long array of authorities, beginning with Munn v. People,[14] and including the Michigan authority.[15] Mr. Justice Grant, dissenting from the opinion of the court, says: "If the contention of the relator be sustained, these railroad companies have no control over their affairs and business, except to carry out such contracts for common carriage as the legislature may see fit to prescribe." After reviewing the constitutional provision granting to the legislature authority to fix maximum rates, and the consequent action of the legislative body in once fixing these rates, Mr. Justice Grant adds: "If, however, I am wrong in the conclusion that this express power inhibits the exercise of any other upon the same subject, I am still of the opinion that the act cannot be sustained under the police power inherent in the legislature under the constitution." But the reasoning, to sustain this position taken by Mr. Justice Grant, will hardly be found sound enough to stand against the majority opinion. Other questions were involved in this case which it is not necessary to refer to here. And further, this case is to be reviewed by the United States Supreme Court. It has been held, in several cases, that a charter provision giving a railroad company power to charge such sums for transportation of persons and property as shall seem desirable, and shall be deemed reasonable, does not preclude the legislature from prescribing a maximum of charges which it may make.[16] It was also held in the United States Supreme Court,[17] reversing the Mississippi court, that a provision in a railroad charter that "the company may, from time to time, fix, regulate and receive the tolls and charges to be received," did not preclude the State from fixing or reducing charges within the limits of its general power to declare what shall be deemed reasonable rates. And even where the charter expressly gives the railroad corporations the power to "fix its own rates," will the right of the legislature to intervene between them and the public be upheld.[18]

[11] Opinion filed October, 1897, not yet reported.

[12] 69 N. W. Rep. 929.

[13] Detroit v. Det. & Howell Plank Rd. Co., 43 Mich. 140.

[14] 69 Ill. 80.

[15] Wellman v. Ry. Co., 83 Mich. 592.

[16] Stone v. Wisconsin, 94 U. S. 181; Peik v. Chicago, *Id.* 164; Chicago v. Ackley, *Id.* 179; Chicago v. Munn, 134 U. S. 418; Ruggles v. Railroad, 108 U. S. 526; Laurel Fork v. West Virginia Co., 25 W. Va. 314.

[17] Stone v. Farmers' Co., 116 U. S. 307; Stone v. Illinois, *Id.* 349.

[18] See Railroad Co. v. Miller, 132 U. S. 75; Railroad Co. v. People, 95 Ill. 313; Ruggles v. People, 91 Ill. 256.

And a charter giving a railroad company right to fix its rates, if not beyond a rate stated in the charter, has been held, subject to legislative power, to fix other reasonable rates as a maximum, from time to time, as changes in money values or operating expenses decrease.[19] From the authorities cited above, it may be concluded that the police power inherent in the legislative idea is all powerful in regulating such rates and charges.

Owosso, Mich. PERCY L. EDWARDS.

[19] Georgia v. Smith, 70 Ga. 794; Winchester v. Croxton, 97 Ky. 1.

MUNICIPAL CORPORATION—NEGLIGENCE OF FIRE DEPARTMENT—LIABILITY OF CITY.

FREDERICK v. CITY OF COLUMBUS.

Supreme Court of Ohio, June 21, 1898.

A municipal corporation is not, in the absence of any statutory provision, liable in damages to one injured by the negligent acts of its fire department or any of its members; nor is it liable for negligence in omitting to inform the members of its fire department of defects in the apparatus of the department, known to itself, nor for neglecting to instruct its fire department in the proper use and management of such apparatus.

MINSHALL, J.: The city of Columbus having purchased a certain apparatus for the extinguishment of fires, called a "fire tower," its fire department was engaged on June 24, 1894, in a practice drill on one of its principal streets, when, by the negligent management of the members of the department, it fell, and caused the death of the plaintiff's husband. He was at the time sitting in his buggy near by, and was without fault on his part in any way contributing to the result. Whereupon his wife having been appointed his administratrix, brought suit against the city to recover damages for the wrongful causing of his death. She charged negligence against the members of the department in managing the tower; also, that the tower was defective, to the knowledge of the city, and that it was negligent in not communicating this fact to the members of its fire department; and that the latter were inexperienced in the use of the tower; and that the city was negligent in not having properly instructed them in its management and use. The city demurred to the petition. The demurrer was sustained, and the petition dismissed. On error, the judgment was affirmed by the circuit court.

The record presents the simple question whether a municipal corporation is liable in damages to one injured by the negligent acts of the members of its fire department engaged in the use of its apparatus, whether in the extinguishment of fires or otherwise. The question has generally, if not universally, been answered in the negative. The ground on which the non-liability of municipal corporations is placed in such cases is that the power conferred on them to establish a department for the protection of the property of its citizens from fire is of a public or governmental nature, and liability for negligence in its performance does not attach to the municipality, unless imposed by statute. The non-liability of the city in such cases rests upon the same reasons as does that of the sovereign exercising like powers, and they are distinguished from those cases in which powers are conferred on cities for the improvement of their own territory and the property of their citizens. "It is obvious," says Gholson, J., in Western College of Homeopathic Medicine Co. v. City of Cleveland, 12 Ohio St. 375, 377, "that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect person and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence and business. As to the first, the municipal corporation represents the State,—discharging the duties incumbent on the State; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegation of power; as to the second, the rules which govern the responsibility of individuals are properly applicable." In this case it was sought to make the city of Cleveland liable for having neglected its duty in not preventing the destruction of the property of the plaintiff by a riotous assemblage of persons. But in the subsequent case of Wheeler v. City of Cincinnati, 19 Ohio St. 19, the suit was for the recovery of damages against the city for having neglected to make proper provision for the extinguishment of fires, whereby the plaintiff's property was destroyed. The court, however, held that the duty of the city in this regard fell within the category of the public duties of the city, and that there was no liability. Speaking of the powers conferred on municipal corporations for the extinguishment of fires, the court said: "The powers thus conferred are in their nature legislative and governmental. The extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers the corporation cannot be held liable to individuals. Nor is it liable for a neglect of duty on the part of fire companies, or their officers, charged with the duty of extinguishing fires. The power of the city over the subject is that of a delegated *quasi*-sovereignty, which excludes responsibility to individuals for the neglect or non-feasance of an officer or agent charged with the performance of the duty."

That the case just noticed is not in all respects like the one before us may be admitted. In it the city was charged with neglect in not making proper provisions for the extinguishment of fires. Here it is charged with neglect in the management of an apparatus for the extinguishment of fires. But the cases uniformly hold that the principle on which municipal corporations are absolved from liability for negligence in the management of their fire departments applies in the one case as well as in the other. In Hayes v. City of Oshkosh, 33 Wis. 314, the action was for property destroyed by fire caused by negligence in working a steam fire engine. Dixon, C. J., in disposing of the case, said: "The question presented in this case is settled by authority as fully and conclusively as any of a judicial nature can ever be said to have been." Then, after citing certain cases from Massachusetts, he proceeds: "The grounds of exemption from liability, as stated in the authorities last named, are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community; that the members of the fire department, although appointed by the corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be made liable, but they act rather as public officers of the city, charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city; and hence the maxim *respondeat superior* has no application." The decision in this case is fully supported by the authorities, and the decisions in the other States of the Union. There is, in fact, a remarkable unanimity on the subject. Dill. Mun. Corp. §§ 974, 976; Jones, Neg. Mun. Corp. § 31; Shear. & R. Neg. § 264; Goddard v. Harpswell (Me.), 30 Am. St. Rep. 388, note 24 Atl. Rep. 958; Hill v. City of Boston, 122 Mass. 344 (a leading case); and numerous other cases cited in brief of counsel, from the principal States of the Union. In Tiedeman on Municipal Corporations (section 333) it is stated that: "Municipal corporations are not liable for the negligence of their firemen—although they may be appointed and removed by the city, and the performance of the duties are wholly subject to its control—where a person is run over by a hose carriage on its way to a fire; for injuries caused by the bursting of a hose; for damage by fire caused by the negligence of the city's firemen; for neglect in cutting off water, by which the fire might have been sooner extinguished; by the bursting of the mains; because a horse is frightened by steam from an engine left in the street; or for any similar lack of care or skill." The cases in which it has been so held in these several instances are cited in a note to the section. A case very much in point here is that of Thompson v. Mayor, etc. of New York, 52 N. Y. Super. Ct. 427, as there the injury for which the suit was brought occurred while the employees of the fire department were engaged in testing a certain apparatus (*i. e.*, a fire tower) prior to its purchase by the city; and, on the ground above stated, the city was held not liable. See, also, Edgerly v. Concord, 59 N. H. 78. It is not always a simple matter to determine to which class of the duties of a municipal corporation a given case belongs. Okey, J., in Robinson v. Greenville, 42 Ohio St. 629. But as observed in Lloyd v. Mayor, etc. of New York, 5 N. Y. 374: "When the line is ascertained, it is not difficult to determine the rights of the parties; for the rules of law are clear and explicit which establishes the rights, immunities and liabilities of the city when in the exercise of each class of powers. All that can be done, probably, with safety, is, to determine in each case, as it arises, under which class it falls." This, however, has been fully determined by the decisions as to cases arising out of the neglect of the fire department of a city or any of its members. The duties violated are, in such cases, regarded as governmental in character, and no liability attaches to the city to compensate persons injured thereby.

The charge that the tower was defective, to the knowledge of the city, and that it was negligent in not communicating this fact to the members of its fire department, and that the latter were inexperienced in the use of the tower, and that the city was negligent in not having properly instructed them in its management, so clearly fall within omissions of a governmental character as to need no further notice.

But it is claimed that the question of the city's liability in this case is settled in this State by the case of Newark v. Frey. This is an unreported case, referred to by Okey, J., in delivering the opinion in Robinson v. Greenville, 42 Ohio St. 625, 629. It is not there referred to as an authority supporting the decision in that case, for there the city was held not liable to a person injured by the discharge of a cannon in its streets by an assemblage of disorderly persons, on the ground that the neglect of a city to prevent such assemblages is simply the neglect of a governmental duty. Newark v. Frey was referred to as a case falling within the rule of municipal liability for the acts of its agents. The act complained of was, as in this case the testing of an apparatus for the extinguishment of fires, at which members of the city council were present. There was an explosion from some very inflammable materials used to make a fire, which caused the injury complained of, and the city was held liable. What consideration was given the case, we do not know. It is not supported by any of the authorities referred to, and is so plainly contrary to the settled law upon the subject, as shown by the authorities, that we do not feel bound by it. Judgment affirmed.

NOTE.—In the absence of an express statute, the rule is, a city is not liable for injuries occasioned by the negligence of firemen while engaged in the discharge of their duties. Wilcox v. Chicago, 107 Ill. 334; Torbush v. Norwich, 38 Conn. 225. And this rule extends to the care of the entire fire apparatus at all times. Dodge v. Granger, 17 R. I. 664; Welsh v. Rutland, 56 Vt. 228. As a part of the governmental machinery of the State, municipal corporations, exercising discretionary functions conferred on them for public purposes and for the public good, are not liable in damages for acts or omissions of its officers and servants. Murtaugh v. St. Louis, 44 Mo. 479; Edgerly v. Concord, 62 N. H. 8. A city may or may not at its discretion establish a fire department. Van Horn v. Des Moines, 63 Iowa, 447; Heller v. Sedalia, 53 Mo. 159. A city cannot assume liability for negligence where the law has not already imposed a liability. Van Horn v. Des Moines, *supra*. A city is exempt from liability for nonuser or misuser where the power conferred has to do with public purposes and is designed for the public good. Otherwise, when it relates to the accomplishment of private corporate purposes, and is exercised in the capacity of a legal individual, the public being only indirectly concerned. Springfield F. & M. Ins. Co. v. Keesville, 148 N. Y. 46; Elliott v. Philadelphia, 75 Pa. St. 347. Firemen's duties do not relate to the exercise of corporate powers, the service being without special advantage to the city in its corporate capacity. New York v. Workman, 67 Fed. Rep. 348; Bailey v. New York, 3 Hill, 531. A city is not charged with such service in consideration of charter privileges. Such functions may be discharged equally well through agents appointed by the State, though usually associated with, and appointed by the municipal body. Bryant v. St. Paul, 33 Minn. 289; Van Horn v. Des Moines, *supra*. Police, health officers and firemen are such officers for whose negligence a city will not be charged. Maximilian v. New York, 62 N. Y. 160; Barbour v. Ellsworth, 67 Me. 294. The rule that cities are not liable for the negligence of its firemen is an exception to the maxim *respondeat superior*. The exception is usually grounded in the public character of the service, but as well may rest on grounds of sound public policy. Liability would constitute them insurers against loss by fire. Wilcox v. Chicago, *supra*; Brinkmeyer v. Evansville, 29 Ind. 187. A city, without due notice of the obstruction, is not liable for the negligence of its firemen in leaving a ladder to project across the sidewalk in front of an engine house, in consequence of which a passerby is injured. Dodge v. Granger, *supra*. Deceased was run over and killed by a ladder wagon negligently driven by a fireman in exercising horses belonging to the fire department. Held, the city was not liable. Gillespie v. Lincoln, 35 Neb. 34. A city owning and operating waterworks is not liable for the negligence of its agents in suffering the supply pipe to be filled with mud, thereby shutting off the water supply and causing loss by fire. Mendel v. Wheeling, 28 W. Va. 233. An incorporated village is not liable for the negligence of its firemen in so thawing out a hydrant as to leave water to freeze on the street, causing injury to one passing over it. Welsh v. Rutland, *supra*. A municipal corporation is not liable for injuries occasioned by the negligence of its paid firemen in navigating its fire boat in the course of the performance of their duties. New York v. Workman, *supra*. Reversing *Idem*, 63 Fed. Rep. 298. Under the admiralty rule, a city is liable to the extent of the value of its fire boat. Thompson Nav. Co. v. Chicago, 79 Fed. Rep. 984.

As to Liability for Negligence of Health Officers.—A city is not liable to a non-paying patient at the city hospital for injuries resulting from negligence or misfeasance of the officers and servants of that institution, the acts or omissions complained of being exercised for the public good and not for private corporate advantage. Murtaugh v. St. Louis, *supra*.

As to Liability for Negligence of Police Officers.—A city is not liable for the negligent, reckless or unlawful conduct of its police officers (Whitefield v. Paris, 84 Tex. 431; Gullikson v. McDonald, 62 Minn. 278), nor for arrest under invalid ordinances. Laura v. Blue, 32 Cent. L. J. 490. *Contra:* McGraw v. Marion, 98 Ky. 673.

St. Louis, Mo. CLINTON L. CALDWELL.

CORRESPONDENCE.

COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.

To the Editor of the Central Law Journal:

In a note to Owens v. Frank, 47 Cent. L. J. 218, Mr. W. C. Rodgers says: "The communications between a physician and his patient to the extent that they relate to the ailment and are necessary to a proper understanding of the symptoms and condition of the patient *are always deemed privileged. This is common law.* . . . " (Italics mine.) p. 219. Is this the common law? Certainly there is a mistake on the part of somebody. Great writers and judges have stated the common law rule to be the reverse of what Mr. Rodgers, with apparent confidence, states it. For instance: Sir James Fitzjames Stephen, in his Digest of the Law of Evidence, Art. 117, says: "Medical men and (probably) clergymen may be compelled to disclose communications made to them in professional confidence." Other eminent English authorities say the same. 1 Phillipps' Ev. (Am. Ed., 1839), 144; 3 Bacon's Ab. (T. & J. W. Johnson's Ed. 1868), 482; 2 Best's Ev. (1st Am. from 6 ch. Lond. Ed.), 1047. And American authorities holding the rule the same way are not scarce. Some of them are 19 Am. and Eng. Ency. Law, 147; 1 Greenl. Ev. (15th Ed.), sec. 248; 1 Wharton's Ev. (1st Ed., 1877), sec. 606; Appleton's Ev. 163; 1 Bouv. Dic., title, "Confidential Communications;" Pierson v. People, 79 N. Y. 424. Many other authorities of the same import might be cited, but these are sufficient to show that somebody is mistaken as to what the common law rule is about confidential communications made by patient to physician. Who is mistaken? J. M. RIGGS.

Winchester, Ill.

To the Editor of the Central Law Journal:

Referring to the communication of Mr. Riggs in regard to the statement of the rule of privilege which I made in a recent annotation in the CENTRAL LAW JOURNAL, will say that the criticism seems to be well taken to the extent that communications between physician and patient are not privileged as to civil controversies. The remark was made by way of introduction to a discussion of matters not privileged in general, and was not perhaps as well guarded as it should have been. I really had in mind confessions in criminal cases where the familiar rule is, admissions or confessions made under the hope of reward or fear of punishment could not be proven against an accused, and upon this well established common law principle I do not think that any statement made by a patient to a physician for the purpose of enabling him to prescribe intelligently could be thus used, for such a confession certainly could not be free and voluntary

because the person, in making same, is under the sway of necessity, as it were, and looks forward to a recovery as the reward, in a sense, of stating the truth, to the end that he may be intelligently treated. The idea of privilege, even in civil cases, however, has become so strong and well fixed in statutory enactments in practically all the States as to be the common law of America, or, more correctly speaking, what the law-making authorities think it should be. Certainly every one has a right to call a physician to prescribe for him when necessary, and his personal liberties are not to be forfeited because, believing it necessary to save his life, perhaps, he makes a full disclosure to the end that the healer may act intelligently. The fact that a communication may be confidentially made to a physician would not affect its privilege, nor would a communication made to an attorney in confidence be privileged but for the fact that it was made in order to enable the attorney to intelligently understand the case, an I, when so made, whether there be any injunction of secrecy or confidence, express or implied, the communication is privileged. It belongs to the accused who may use it or not; may waive it, if he wish; but need not do so. The same principle underlies both classes of professional advice, and is analogous to that which usually holds as sacred and privileged those statements made to a priest in order to have absolution. The absolution is the inducement to the admission. Without the hope of this, the confession would not be made. Without the hope that, by reason of the confession or admission, the patient would be cured or benefited, he would not divulge to his medical adviser any fact which might criminate him. But in none of these cases is the communication deemed privileged because of the confidence imposed in the medical, legal or spiritual adviser, as the case may be; but it rests upon the policy of the law itself which favors the right of a person to make disclosures when absolutely necessary for his physical, legal or spiritual safety or welfare. And the confessions are always confined to matters necessary to be divulged in the particular case. So strong, indeed, is the idea in this country that communications between a physician and patient should be privileged, that statutes in many of the States have made all disclosures of a confidential nature between a physician and patient, as well as all the physician may observe in connection with his treatment of the patient, absolutely privileged. And so general are these statutes in the American States that it will be well in all cases to consult the local statutes in order to ascertain the precise rule in any jurisdiction.

W. C. RODGERS.

HUMORS OF THE LAW.

A small Scotch boy was summoned to give evidence against his father, who was accused of making a disturbance in the streets. Said the bailie to him:

"Come, my wee man, speak the truth, an' let us hear all ye ken about this affair."

"Weel, sir," said the lad, "d'ye ken Inverness street?"

"I do, laddie," replied the magistrate.

"Weel, ye gang along it and turn into the square, and cross the square—"

"Yes, yes," said the bailie, encouragingly.

"And when ye gang across the square ye turn to the right and up the High street, and keep up High street till ye come to a pump."

"Quite right, my lad; proceed," said the magistrate. "I know the old pump well."

"Weel," said the boy, with the most infantile simplicity, "ye may gang and pump it, for ye'll no pump me."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE—Conveyances for Passengers.—A provision of an accident insurance policy that the insurer shall not be liable for injuries or death caused while the insured is trying to "enter or leave a moving conveyance using steam as a motive power [or is] in or on any such conveyance not provided for transportation of passengers," does not defeat recovery for death from an injury received while riding by invitation in a locomotive drawing a passenger train, the locomotive and train together constituting a "conveyance" for transportation of passengers.—BERLINER v. TRAVELERS' INS. CO., Cal., 53 Pac. Rep. 918.

2. ACTION—Venue—Action on Note.—Under the constitution (article 8, § 5), all actions, civil and criminal, must be commenced and tried in the county in which the causes arise, unless a change of venue be taken, after suit brought in the proper county, in such cases as may be provided by legislative enactment.—BROWN v. BACH, Utah, 53 Pac. Rep. 991.

3. ADMINISTRATION—Presentation of Claims.—Gen. Laws, ch. 215, § 3, provides that within 30 days after the period for presentation of claims, the administrator shall file a statement allowing or rejecting claims presented, and, if he believe the estate insolvent, ask for appointment of commissioners to approve the claims; but if the estate be solvent, and he desire to contest any claim presented, he may elect whether the same be proved before commissioners or by suit. Held, that the limit of time prescribed applies to solvent as well as insolvent estates.—MCGOWAN v. PEABODY, R. I., 40 Atl. Rep. 758.

4. ADVERSE POSSESSION—Burden of Proof.—This being an action for the recovery of land, upon the trial of which the plaintiffs made out a *prima facie* case, and the defendants resting upon an alleged prescription under color of title for more than seven years, the burden was upon them to affirmatively establish the same by evidence. Having failed to do this, the verdict in their favor was not supported, and was there

fore contrary to law.—BUSSEY v. JACKSON, Ga., 30 S. E. Rep. 646.

5. APPEAL—Supersedeas Bond—Conditions.—Under Code, § 591, subd. 1, providing that a *supersedeas* bond shall be conditioned to pay the condemnation money and costs in case the final judgment shall be affirmed in whole or in part, an additional condition imposed by the court, that it shall include interest from the date of the judgment, is nugatory.—DERRINGTON v. CONRAD, Kan., 53 Pac. Rep. 881.

6. ARCHITECTS—Powers.—An architect superintending the erection of a building has no implied power to order extra work, so as to bind the owners.—DAY v. PICKENS COUNTY, S. Car., 30 S. E. Rep. 681.

7. ARREST WITHOUT WARRANT—Homicide.—Except in pursuance to the command of a warrant, a sheriff has no authority to make an arrest for a misdemeanor not committed in his presence; nor will the acts and language of a person which induces the officer as a reasonable man to believe such person guilty of a misdemeanor authorize his arrest without warrant.—STATE v. DIETZ, Kan., 53 Pac. Rep. 870.

8. ASSIGNMENTS—Set-off and Counterclaim.—A party owning the building in which a bank did business, after its failure, assigned his claim for rent due and to become due. He was indebted to the bank, and his debt was past due. Assignee sued the bank's receiver to recover, who pleaded a set-off. Held, that the past-due indebtedness could not be allowed as a set-off against that portion of the assigned debt which was not due at the time of the assignment.—KOEGEL v. MICHIGAN TRUST CO., Mich., 76 N. W. Rep. 74.

9. ATTORNEY AND CLIENT—Debarment.—An accusation charging an attorney with conspiring with the attorney for a defendant accused of murder to sell to a newspaper, during the trial, a confession from defendant, to be procured by his attorney, and attempting to sell a purported confession, which he said he could have attested by the district attorney and the judge, is not sufficient to disbar him.—IN RE HAYMOND, Cal., 53 Pac. Rep. 599.

10. BENEVOLENT SOCIETY—Benefit Certificate.—The by-laws of a benevolent society provided that the suicide of a member should invalidate a benefit certificate issued upon his life. Held, that a suit upon such certificate could not be defeated merely by proof that the attending physician of the deceased member, in an affidavit procured from him by the society, had declared that the decedent had died by his own hand.—SUPREME LODGE KNIGHTS OF HONOR v. JAGGERS, N. J., 40 Atl. Rep. 783.

11. BENEVOLENT SOCIETY—Suspension of Subordinate Lodge—Waiver.—The by-laws of a fraternal benevolent association provided that the failure of a subordinate lodge to remit assessments to the supreme lodge within a certain time should suspend the subordinate lodge, and that in such case the supreme president could deprive the members of the subordinate lodge of all benefits from the death benefit fund. Held, that the suspension of the lodge did not suspend its members so as to require an application by them for reinstatement, but its only effect was to deprive the members of the death benefit fund during the period of suspension, especially where other sections provided explicitly as to suspension and reinstatement of members for failure to pay assessments.—SUPREME LODGE NAT. RESERVE ASSN. v. TURNER, Tex., 47 S. W. Rep. 44.

12. BILLS AND NOTES—Consideration.—The surrender of certain notes and securities, in which a corporation was interested, and which operated as a benefit to it and as a disadvantage to the creditors, is a sufficient consideration to support a promissory note and mortgage given by the corporation upon the authority of a resolution duly passed by the board of directors for that purpose.—FERNALD v. HIGHLAND HALL CO., Kan., 53 Pac. Rep. 861.

13. BILLS AND NOTES—Gaming Transactions.—A note given to cover margins in stock gambling transactions not within Act April 22, 1794, § 8, making utterly void any note in consideration of losses sustained at any "match of cock-fighting, bullet-playing, or horse-racing, or at or upon any game of address, game of hazard, play or game whatsoever."—NORTHERN NAT. BANK OF LANCASTER v. ARNOLD, Penn., 40 Atl. Rep. 794.

14. BILLS AND NOTES—Guaranty—Assignment.—A delivery of a negotiable instrument by the payee, for a consideration, upon which instrument an assignment and guaranty in blank had been previously written by the payee, carries with it the contract of guaranty.—CRISSEY v. INTERSTATE LOAN & TRUST CO., Kan., 53 Pac. Rep. 867.

15. BILLS AND NOTES—Holder for Value.—Where a note was issued by the treasurer of a corporation payable to himself, at a time when the corporation was in the hands of an assignee for benefit of creditors, the fact that the indorsee of such note had full notice of said assignment was sufficient to put him on inquiry as to the note.—RANDALL v. RHODE ISLAND LUMBER CO., R. I., 40 Atl. Rep. 763.

16. BILLS AND NOTES—Renewals—Evidence.—It is, in the trial of an action upon a promissory note, competent to prove that it was the last of a series of several renewals of a note originally given, and also to prove what was the consideration of the first note, without producing it or any of the renewal notes.—MERCHANTS' NAT. BANK OF ROME v. VANDIVER, Ga., 30 S. E. Rep. 650.

17. BUILDING AND LOAN ASSOCIATIONS—Usury.—A foreign building and loan association, doing business in Texas under a permit from the State, by making a loan contract showing that both parties intended it should be performed in Texas, subjects the contract to the usury laws of Texas, though the note was made payable in the foreign State, where the contract was not usurious.—CRENSHAW v. HEDRICK, Tex., 47 S. W. Rep. 71.

18. CHATTEL MORTGAGES—Recording.—Civ. Code, § 2957, provides that a mortgage of personal property is void as against creditors unless recorded in like manner as grants of real property. Held that, since recordation has been made by the code the equivalent of an immediate delivery and continued change of possession, a chattel mortgage not immediately recorded is void as to creditors whose claims arose between its execution and recordation.—RUGGLES v. CANNEDY, Cal., 53 Pac. Rep. 911.

19. CONSTITUTIONAL LAW—Ex Post Facto Laws.—Accused were indicted by a grand jury composed of 12, under the provisions of article 117 of new constitution, and convicted by a petit jury of 12, of whom less than the whole number concurred, under the provisions of article 116. The crime was burglary committed before adoption of constitution of 1898. The defense was made that these provisions of the constitution were *ex post facto* as applied to past offenses, and that accused could be indicted only by a grand jury composed of 16, and convicted only by a concurrence of all 12 of the petit jury. Held, the provisions referred to operate changes in the method of procedure only, relate to the remedy, and are in no sense *ex post facto* in character, and that articles 116 and 117 of the constitution are self-operative.—STATE v. CALDWELL, La., 28 South. Rep. 869.

20. CONTRACT—Building Contract—Plans and Specifications.—Where the owner of premises and a builder enter into a contract for the erection of a building at an agreed price therefor, and, after part performance by the builder, such material departures from the plans and specifications are made, at the instance of the owner, as will result in a new and different undertaking, without any agreement as to the price for such departures, the builder may recover for the reasonable value of the material and labor furnished in accordance with such new undertaking, and will not be limited to the price agreed upon in the original contract.—RHODES v. CLUTE, Utah, 53 Pac. Rep. 990.

21. CONTRACTS — Consignment of Goods.—An agreement under which goods were consigned to a party for

sale contained these provisions: That the goods should continue the property of consignors until sale was made, "approved by them;" that consignee should notify consignors "whenever any sale is made, stating the terms thereof;" and that consignee should sell the goods "for account of consignors, and account to them therefor." Held, that consignee had the right to sell without the approval of consignors, and in doing so would not be guilty of conversion.—HASSETT v. COOPER, R. I., 40 Atl. Rep. 842.

29. CORPORATION—Building and Loan Associations—Foreign Corporations.—Where a foreign corporation appoints agents in Tennessee for the purpose of working up a loan business and inducing people to effect loans with the corporation, who do effect loans, it carries on business in Tennessee, in the sense of the foreign corporation laws.—UNITED STATES SAVING & LOAN CO. v. MILLER, Tenn., 47 S. W. Rep. 17.

23. CORPORATIONS — Foreign Corporations — State Regulation—"Doing Business."—Complainant, a New York corporation, loaned money to defendant in Tennessee, taking as security a mortgage upon land in the latter State, without having complied with the conditions prescribed by the Tennessee statutes for foreign corporations doing business within the State. The negotiations were all carried on by mail, through agents in Tennessee, the loan being approved at the company's home office in New York, and all notes being payable at that office. Held, that the contract was made in New York, and to be performed there, and that the company was not doing business in Tennessee within the meaning of the statutes.—EASTERN BUILDING & LOAN ASSN. v. BEDFORD, U. S. C. C., W. D. (Tenn.), 88 Fed. Rep. 7.

24. CORPORATIONS—Insolvency — Bonds.—A corporation, being involved and in the hands of a receiver, arranged, through its officers, with a majority of its creditors, for an extension by giving four time notes to each creditor to cover his claim, and the receiver was thereupon discharged. Two of the creditors did not receive notes under such arrangement. Payment on the first of the series of notes was defaulted, and it was then proposed to take up the notes by an issue of bonds in lieu of them, secured by mortgage on the corporation property, which proposition was accepted by a majority of the creditors, and the bonds were issued to them, some, however, retaining their notes, and others being paid cash. Held, that at the time of executing the bonds and mortgage the corporation was insolvent, within Corporation Act, § 64, which prohibits transfers by insolvent corporations.—SKIRM v. EASTERN RUBBER MFG. CO., N. J., 40 Atl. Rep. 769.

25. CORPORATIONS — Insolvency — Stockholders' Liability.—Since Comp. St. 1887, div. 5, ch. 25, § 457, providing that stockholders shall be individually liable to creditors to the amount of their unpaid stock for all acts of the company until the whole amount of stock subscribed for shall have been paid in, prescribes no remedy, a judgment creditor whose execution against the corporation has been returned *nulla bona* may go into equity to obtain relief against the stockholders.—KELLY v. FOURTH OF JULY MIN. CO., Mont., 53 Pac. Rep. 959.

26. CORPORATIONS — Meetings of Directors.—Where meetings of a legally constituted board of directors have been held and business transacted within the scope of, and pursuant to, the purposes for which the corporation was organized, the presumption is that such meetings were regularly called and held for the transaction of such business, and the burden of proof is upon him who maintains the contrary to allege and prove that they were not so called and held.—SINGER v. SALT LAKE CITY COPPER MFG. CO., Utah, 53 Pac. Rep. 1024.

27. CORPORATIONS—Stock Subscription.—A stock subscription, by which a corporation has been organized, existed for two years, and is in the full exercise of its functions, cannot be repudiated by some of the shareholders, and the corporation thrown into the hands of a receiver, to the prejudice of the other shareholders, and those who made the subscription, merely and only on the ground, taken by the dissatisfied stockholders, that the subscription was illegal, the full amount of which is retained, of which all the shareholders approved, and all of them have shared the benefit of the subscription.—MULQUEENEY v. SHAW, La., 23 South. Rep. 915.

28. COUNTIES CREATED OUT OF OTHERS—Bonds—Validity.—In an action by a county to recover of a new county, formed partly out of it, the latter's proportion of indebtedness accrued prior to its formation, the latter pleaded limitations of two years. The new county had paid on its proportion of the indebtedness to within two years of the filing of the suit. Held no defense, since the cause of action did not arise until the discontinuance of payment.—HARDEMAN COUNTY v. FOARD COUNTY, Tex., 47 S. W. Rep. 30.

29. CREDITORS' SUITS — Parties.—Where a judgment creditor sues to subject equitable assets to his judgment, defendants cannot require other judgment creditors to be brought in as parties, inasmuch as a creditor commencing such action acquires an equitable lien on such assets, and a priority over other judgment creditors who have not previously commenced any such suit.—SEYMOUR v. MCAVOY, Cal., 53 Pac. Rep. 946.

30. CRIMINAL EVIDENCE — Compulsory Evidence—Searchers and Seizures.—A letter written by a prisoner while in jail, and without being closed or sealed, and handed to another prisoner to be sealed and mailed to a witness of the writer, is competent evidence against the accused, notwithstanding same may have been surreptitiously read by the person to whom it had been intrusted, and thereafter handed to a deputy sheriff, instead of being mailed.—STATE v. RENARD, La., 23 South. Rep. 894.

31. CRIMINAL EVIDENCE — Homicide—Dying Declarations.—Where a deceased, prior to her death, stated to a witness that she was going to die, statements made to another witness as to how she received the injuries resulting in her death, to whom she also stated 15 minutes after the statements made to the first witness that she was about to die, are admissible as dying declarations.—STATE v. TRUSTY, Del., 40 Atl. Rep. 766.

32. CRIMINAL LAW—Common Cheat.—Where a prosecutor in a pending warrant or indictment, knowingly, and with intent to defraud and cheat, falsely pretends to the wife of the accused that, as prosecutor, he has the power to compromise the crime therein alleged against her husband, and thereby deceives her, and by means of this false pretense, and a promise to settle the prosecution, obtains money from her, and there is a breach of the promise, such prosecutor is guilty of being a common cheat and swindler, under section 670 of the Penal Code.—RYAN v. STATE, Ga., 30 S. E. Rep. 678.

33. CRIMINAL LAW — Conspiracy to Extort Money.—A conspiracy to extort money from a person who has violated the criminal law, by threatening to have him prosecuted for the infraction unless he pays the moneys demanded, is an indictable offense.—PATTERSON v. STATE, N. J., 40 Atl. Rep. 773.

34. CRIMINAL LAW—Discharge—Bar.—Rev. St. 1889, § 4223, provides that if a person indicted for an offense, and held to answer on bail, shall not be brought to trial before the end of the third term of the court in which the cause is pending after indictment found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happened on his application and be occasioned by want of time to try the cause at such third term. Held, that this was a special statute of limitation, and that a discharge thereunder amounted to an acquittal of the offense charged, and was a complete defense to the subsequent indictment for the same offense.—STATE v. WEAR, Mo., 46 S. W. Rep. 1099.

35. CRIMINAL LAW—Indictment—Practice of Medicine.—An indictment drawn under the act "to regulate the

practice of medicine in the State of Ohio" (92 Ohio Laws, p. 44), which charges that the defendant, without having complied with the provisions of the act, for a fee, prescribed, directed, and recommended for the use of a person named a drug, medicine, and agency, put up in a paper box, on which he wrote directions, to which he signed his name, and appended thereto the letters "M. D.," is not bad for duplicity.—HALE v. STATE, Ohio, 51 N. E. Rep. 154.

36. CRIMINAL LAW — Shooting with Dangerous Weapon.—The verdict guilty of shooting with intent to kill, on an indictment for shooting with a dangerous weapon with intent to kill and murder, necessarily implies shooting with a dangerous weapon, charged in the indictment; and the express words not in the verdict are supplied by the implication.—STATE v. O'LEARY, La., 23 South. Rep. 885.

37. CRIMINAL PRACTICE—Homicide—Indictment.—In an indictment for murder, it is essentially necessary to set forth particularly the manner of the death, and the means by which it was effected, but in stating the facts which constitute the offense, no technical terms are required; and an averment of the manner and means by which the deceased came to his death, in concise and ordinary language, and in such a way as to enable a person of common understanding to know what was intended, is sufficient.—MICHAEL v. STATE, Fla., 23 South. Rep. 944.

38. CRIMINAL TRIAL—Competency of Juror.—A person who has read a newspaper account of a homicide, and has also learned the facts pertaining to the same from one who assumed to know and state them, and, based thereon, has formed and expressed an opinion as to the guilt of the accused, which would require evidence to remove, is not a qualified juror, although he may state that he believes he could give the accused a fair and impartial trial.—STATE v. BEUERMAN, Kan., 53 Pac. Rep. 874.

39. DAMAGES—Excessive Verdict.—In suits to recover for personal injuries, or for death by wrongful acts, a verdict which is grossly excessive will be set aside without regard to the number of times the case has previously been tried.—CONSOLIDATED TRACTION CO. v. GRAHAM, N. J., 40 Atl. Rep. 773.

40. DEEDS—Fraud—Ratification — Trusts.—A brother held the legal title to land, burdened with an express trust in favor of his sisters, conveyable to them on demand and payment of their share of the purchase money. A sister, after refusal to pay her share, conveyed her interest to him for a cash consideration. Two years later she discovered she had been defrauded, but she took no step to set the deed aside for ten years, and until six months after his death, knowing all this time of the improvement and development of the land. Held, that her laches was an affirmance of the deed, and it was too late to rescind it.—INLOW v. CHRISTY, Penn., 40 Atl. Rep. 823.

41. DIVORCE—Alimony or Support for Children.—The rule that the death of the husband puts an end to the payment of alimony, or money for the support of minor children, was applicable at common law to a divorce *a mensa et thoro*, which did not finally terminate the marriage relations, but merely effected a separation, without disturbing the marital rights and obligations; but it does not necessarily apply to a decree of divorce granted under the statutes of this State, which has the same effect upon the marriage relations and marital rights and obligations as a divorce *a vinculo matrimonii* at common law.—MURPHY v. MOYLE, Utah, 53 Pac. Rep. 1010.

42. DIVORCE—Cruelty—Evidence.—Evidence that before marriage a wife was innocently contaminated with syphilis by her husband, and after marriage kept by him constantly afflicted with it, until, after enduring it for five years, her life was endangered by longer living with him, shows cruel treatment, endangering her life, or indignities to her person, rendering her condition intolerable and life burdensome, and there by forcing her to withdraw from his house and family.—MCMAHEN v. MCMAHEN, Penn., 40 Atl. Rep. 795.

43. ELECTION—Certified Nominations—Constitutional Law.—The requirement of section 6 (89 Ohio Laws, p. 434) that certified nominations of candidates for public offices must be made by "convention, caucus, meeting of qualified electors, primary election held by such electors or central or executive committee, representing a political party, which at the next preceding election polled at least one per cent. of the entire vote cast in the State," is not repugnant to any provision of the constitution.—STATE v. POSTON, Ohio, 51 N. E. Rep. 150.

44. EMINENT DOMAIN—Condemnation Proceedings—Damages.—In condemnation proceedings, an instruction to allow the value of the land actually taken for the right of way, and such further sum as represents the damage to the whole tract of which the right of way forms a part, is not erroneous as allowing double damages.—CHICAGO, R. I. & P. RY. CO. v. GEORGE, Mo., 47 S. W. Rep. 11.

45. FEDERAL COURTS—Circuit Court of Appeals—Jurisdiction.—The circuit court of appeals has no jurisdiction of an appeal in proceedings in admiralty for limitation of liability, when the only question presented for review on the record is whether the district court had power and jurisdiction, after final disposition of the questions of limitation, to enter a decree *in personam* against the owners of the vessel for damages suffered by some of the interveners.—THE ANNIE FAXON, U. S. C. C. of App., Ninth Circuit, 87 Fed. Rep. 961.

46. FRAUDULENT CONVEYANCES.—A confession of judgment by an insolvent debtor in favor of the executor of an estate in which he is interested as a devisee is void as to existing creditors because upon a secret trust in the debtor's favor.—MANLEY v. LARKIN, Kan., 53 Pac. Rep. 859.

47. FRAUDULENT CONVEYANCES—Conveyance to Husband in Trust.—Where a husband purchased at a judicial sale with his wife's means and in her behalf land deeded by her direction to him in trust for the support of himself and her children, free from his debts, contracts and liabilities, and on his death to go to the children equally, the transaction is free from fraud of the rights of his creditors, however insolvent he may be.—COOK v. JONES, Tenn., 47 S. W. Rep. 15.

48. GIFT CAUSA MORTIS—Validity.—On March 19, 1897, a decedent, during his last illness, placed in defendant's hands two savings bank books, saying he wanted him to draw the money, and pay his creditors and funeral expenses, and then select some charitable institution, and give it $100. He said nothing about any balance, did not specify any institution, but told defendant to select it. The orders for the money were prepared, and signed by decedent, and defendant then said that, if decedent got well, he would keep the money safely for him. The orders were sent to the banks, and the money received by the defendant. Decedent died on March 22d. Prior and subsequent to decedent's giving the bank books to defendant, he stated to others that he wished defendant to have the balance. Held insufficient to show a gift *causa mortis*, either to defendant or any charitable institution.—HART v. KETCHUM, Cal., 53 Pac. Rep. 931.

49. HABEAS CORPUS — Arrest for Extradition.—In *habeas corpus* proceedings for the discharge of a prisoner held under an extradition warrant issued by the governor of a State, the question of the prisoner's identity cannot be raised by demurrer to the return of the officer to the writ.—IN RE BLOCH, U. S. D. C., W. D. (Ark.), 87 Fed. Rep. 981.

50. HIGHWAY — Tolls — Bicycle Riders.—Where the only provisions of a turnpike road company's charter which authorize the corporation to charge tolls empower it to "demand and receive tolls for traveling each mile of said road, not exceeding the following rates," specifying rates for several vehicles, drawn by one or more beasts, a man traveling the turnpike road

upon a bicycle is not within the class from which the company is authorized to exact tolls, and the company has no power to collect them from such a rider.—STRING v. CAMDEN & BLACKWOOD TOWN TURNPIKE CO., N. J., 40 Atl. Rep. 774.

51. HOMESTEAD.—Husband and wife made a written application for a loan, stating therein that the land offered as security was not their homestead. They did not reside on the land. In a suit against their heirs to foreclose, the application was offered in evidence. Held admissible, as a declaration tending to show that, if the land was ever a homestead, it had been abandoned.—BOWMAN v. RUTTER, Tex., 47 S. W. Rep. 52.

52. HOMESTEAD—Declaration—Stipulation.—Recitals in a declaration of homestead of the facts required by the statute to establish a right of homestead in lands are no evidence of the truth of such facts, which must be proved *aliunde*.—APPRATE v. FAURE, Cal., 53 Pac. Rep. 917.

53. HUSBAND AND WIFE—Gifts—Presumption.—From the sole fact that the deed to property acquired during the marriage relationship is taken in the wife's name, no presumption arises that it was intended that she should take it as her separate property, and as a gift.—CAFFEY'S EXRS. v. COOKSEY, Tex., 47 S. W. Rep. 65.

54. HUSBAND AND WIFE—Resulting Trust.—Evidence that a husband had sufficient money belonging to his wife in his hands at the time of a purchase of certain land does not show a purchase for the wife, so as to establish a resulting trust.—KEITH v. MILLER, Ill., 51 N. E. Rep. 151.

55. INJUNCTION—Restraining Action at Law.—Equity will not enjoin legal proceedings, including the action of ejectment, where the law court is competent to adjudicate, upon proper pleas in the legal action, the matters presented to the court of equity as a ground for injunction.—BYRNE v. BROWN, Fla., 23 South. Rep. 877.

56. INSOLVENCY—Conveyance of Property by Deed Absolute.—Where an insolvent debtor, to prevent his property being seized and sold under legal process, conveys substantially all of it by a deed absolute in form, and by a contemporaneously executed written agreement the grantee is authorized to sell and convey the same, and apply the proceeds thereof—First, to reimburse himself for any advancements he may subsequently make to or on behalf of the grantor; second, to pay the legal debts of the grantor, preferring one of his creditors—the transaction constitutes a general assignment for the benefit of the grantor's creditors.—MAAS v. MILLER, Ohio, 51 N. E. Rep. 158.

57. INSOLVENCY—Discharge — Claim for Tort.—Gen. Laws, ch. 274, § 28, provides that claims "growing out of trover, replevin, or any tort" may be proved against an insolvent, and section 50 provides that a discharge in insolvency shall release an insolvent from "all his provable debts." Held, that one who has a claim for goods bought by one when insolvent, with the intent not to pay for them, and which claim has been proved in the insolvency proceedings, cannot object to the discharge of the insolvent.—IN RE BROUILLARD, R. I., 40 Atl. Rep. 762.

58. INSURANCE—Indorsing Other Insurance—Waiver.—Where an insurance company, notified of other insurance not indorsed on a policy, fails to recall or cancel it, return premiums or assessments collected, or the premium note, binding insured to pay premiums at such time and in such manner as insurer's directors might lawfully require, it waives a provision avoiding the policy for failure to indorse other insurance.—KALMUTZ v. NORTHERN MUT. INS. CO. OF LANCASTER COUNTY, Penn., 40 Atl. Rep. 816.

59. INSURANCE—Right of Action.—An insurance policy contained a provision that "legal proceedings for recovery hereunder shall not be brought until after three months from the date of filing proof at the company's home office, or brought at all unless begun within six months from the time when the right of action shall accrue." In an action upon the policy, held, that the right to bring an action did not accrue until three months after the time of filing proofs, and that the period of limitation prescribed did not begin to run until the right to bring an action had accrued.—STANDARD LIFE & ACCIDENT INS. CO. v. DAVIS, Kan., 53 Pac. Rep. 856.

60. INSURANCE—Substituted Policy—New Conditions.—An insurance company, which offers to issue, free of charge, to the policy holders of an insolvent company, its own policies for the period for which premiums have been paid in the old company, is bound, on acceptance of its offer, only by the stipulations in its own substituted policy, and not by those in the original policy of the insolvent company.—BROWN v. UNITED STATES CASUALTY CO., U. S. C. C., W. D. (Tenn.), 88 Fed. Rep. 38.

61. INTEREST—When Payable.—Where a contract for the payment of money contains no specific promise for the payment of interest at a time different from that fixed for the payment of principal, the principal and interest both become due and payable at the same time.—MOTSINGER v. MILLER, Kan., 53 Pac. Rep. 869.

62. INTOXICATING LIQUORS—Local Option—County Election.—Under Const. 1895, art. 16, § 20, providing that the legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice precinct, town, city, or such subdivision of a county as may be designated, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits, a county election held under a law passed in accordance therewith, which resulted in favor of prohibition, includes all precincts in the county, whether or not the vote in such precincts resulted favorably to prohibition.—EX PARTE FIELDS, Tex., 46 S. W. Rep. 1127.

63. JUDGMENT BY DEFAULT — Vacation.—Ordinarily, the setting aside of a judgment by default rests within the sound legal discretion of the court, and the appellate court will not interfere, but where it is made clearly to appear that there was such an abuse of discretion, through inadvertence or otherwise, as to render the action erroneous and unlawful, the appellate court will control such discretion, and set aside the illegal action; and the power to do so is recognized by section 3005, Comp. LAWS.—UTAH COMMERCIAL & SAVINGS BANK v. TRUMBO, Utah, 53 Pac. Rep. 1033.

64. JUDICIAL SALE — Death of Purchaser.—The death of a purchaser at a sheriff's sale before confirmation thereof does not avoid the sale, but it may be confirmed by the court, and a deed ordered on the motion of any party interested as if such death had not occurred.—CRONKHITE v. BUCHANAN, Kan., 53 Pac. Rep. 863.

65. LANDLORD AND TENANT — Defective Apparatus—Contributory Negligence.—A tenant had personal knowledge of the location of the various pipes and parts of an apparatus generating gas from gasoline, and knew that they were in a defective condition; having been warned previously by a plumber to have the pipes tested before using the apparatus. He was informed by a book of instructions that it was dangerous to approach the gas vault with a light, and that in case of a leakage of gas it was dangerous to enter the vault. Having lit the gas, and it not having burned satisfactorily, he entered the cellar where the pipes were with a lighted lantern, whereupon an explosion occurred, causing personal injuries. Held, that he was guilty of contributory negligence, as a matter of law.—MITCHELL v. STEWART, Penn., 40 Atl. Rep. 799.

66. LANDLORD AND TENANT — Forfeiture of Demised Premises.—Where a forfeiture of demised premises has been incurred by the tenant, the landlord cannot enforce it against such portion thereof as he desires to retake into his possession, and waive it as to the rest of the premises.—OCEAN GROVE LAND ASSN. v. BERTHALL, N. J., 40 Atl. Rep. 779.

67. LIFE INSURANCE—Insurance Company — Liability of Officers.—The agents and directors of a co-operative

life insurance society chosen by the members of the society to conduct its affairs cannot, in the absence of fraud, be held responsible by a member after the insolvency of the society for money paid to the society, and paid out by it under its articles and rules.—PERKINS v. FISH, Cal., 53 Pac. Rep. 901.

68. MALICIOUS PROSECUTION — Probable Cause.—Though one arrested upon a criminal warrant be discharged by the magistrate, yet if the prosecutor, with due diligence, follows up the prosecution, and carries it on in a court having jurisdiction to try the case upon its merits, this is, in effect, a continuation of the original prosecution.—HARTSHORNE v. SMITH, Ga., 30 S. E. Rep. 666.

69. MASTER AND SERVANT—Independent Contractors.—A standpipe was constructed by an independent contractor. Before its formal acceptance by the company owning it, but after it was practically completed, and had been filled with water, which was being used in supplying customers, it collapsed. Held, that the company, having assumed practical control by appropriating it to the use for which it was erected, was liable to third persons injured by it to the same extent as if there had been a formal acceptance.—READ v. EAST PROVIDENCE FIRE DIST., R. I., 40 Atl. Rep. 760.

70. MINING CLAIMS—Location — Vein or Lode.—In a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or a lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made, of the existence of mineral there.—HAYES v. LAVAGNINO, Utah, 53 Pac. Rep. 1029.

71. MORTGAGE—Construction—Insurance.—Where an act of mortgage authorizes the mortgagee to take out insurance in case the mortgagor fails to do so, and stipulates that the premiums paid up to a certain sum shall be considered covered by the mortgage, such premiums, within the limit, may properly be included in the order for executory process as an incidental expense, upon production of the receipt or an affidavit showing payment thereof by the mortgagee.—GERMANIA SAV. BANK OF NEW ORLEANS v. LEMLEY, La., 23 South. Rep. 874.

72. MORTGAGE — Foreclosure — Negligence.—Where one signs a mortgage without reading it, if he has the opportunity to do so, or, if he cannot read, without asking to have it read to him, or declining to have the instrument read or explained to him by one who offers to do so, on the assurance of a third party that the instrument is all right, he cannot avoid the legal effect of his signature as against the original payee, who was guilty of no fraud or deception in its execution, and of no negligence, so as to be responsible for the mistake, or as against an innocent purchaser, by setting up that the paper was different from what he supposed it was, and that the statements of a third party, upon which he relied, were false.—SNELGROVE v. EARL, Utah, 53 Pac. Rep. 1017.

73. MORTGAGES—Priority.—Where a new mortgage is taken and recorded to secure the same debt, and the fact is so stated in the mortgage, it has priority over any intervening incumbrance.—HARDIN v. EMMONS, Nev., 53 Pac. Rep. 854.

74. MORTGAGE—Release.—A note secured by a deed of trust was transferred by the payee. The holder authorized the payee to collect interest, but gave no authority to collect the principal. The payee collected the principal, released the deed of trust on the record in his own name, presenting a forgery of the original note for cancellation, and appropriated the money. Held an invalid release.—RIPLEY NAT. BANK v. CONNECTICUT MUT. LIFE INS. CO., Mo., 47 S. W. Rep. 1.

75. MUNICIPAL CORPORATIONS — Defective Sidewalks.—A hole in a sidewalk had been filled up with a stone which projected about four inches above the pavement. Near the hole a number of bricks had been displaced, and were lying around loose. While walking along the sidewalk in the daytime, plaintiff struck her foot against the stone, and was injured. Had she looked, she could have seen the stone. Held, that she was guilty of contributory negligence.—SHALLCROSS v. CITY OF PHILADELPHIA, Penn., 40 Atl. Rep. 818.

76. MUNICIPAL IMPROVEMENTS — Authority of Street Superintendent.—A city council has no power in its specifications for bids for the improvement of a street to delegate to a street superintendent the authority to determine the amount of work to be done by the successful bidder, what materials shall be used in certain events, and whether the right quality and quantity of material have been used, and an assessment for improvements based on such specifications is invalid.—STANSBURY v. WHITE, Cal., 53 Pac. Rep. 940.

77. NEGLIGENCE — Injury to Employee—Expert Evidence.—Where buildings used exclusively in the business of railroading are peculiar and more or less complicated structures, and their construction requires skill in the mechanic arts, and is outside the knowledge and experience of ordinary jurors, the opinion of an expert witness on the question whether or not such buildings were carefully and properly constructed is admissible.—HAYES v. SOUTHERN PAC. CO., Utah, 53 Pac. Rep. 1001.

78. NEGLIGENCE—Injury to Person on Sidewalk.—Pedestrians are entitled to the right of way on the sidewalks of the city, and to the assurance that they may traverse the same in the confidence of safety.—MAHAN v. EVERETT, La., 23 South. Rep. 883.

79. NEGLIGENCE — Proximate Cause — Contributory Negligence.—Plaintiff's evidence showed that defendant's freight train had stood across a public street at a way station for seven or eight minutes when plaintiff's 12 year old son, of ordinary intelligence, passed along the street, and, after waiting two or three minutes for the train to move on, attempted to cross between the cars, and while climbing over the couplings the train started backwards without giving notice by bell or whistle, and he was crushed between the cars. Held, that the evidence clearly showed that the proximate cause of the injury was due to the boy's negligence, and that a nonsuit was justifiable.—STUDER v. SOUTHERN PAC. CO., Cal., 53 Pac. Rep. 942.

80. NEGLIGENCE OF DRIVERS ON STEEETS.—A two year old child escaped into a street, where it was run over by a wagon, at a place from 5 to 10 feet away from the curb. When it stepped off the curb, it was about 25 feet ahead of the wagon. The horses were going at a slow trot, and the driver was not looking ahead. Held, that the question of the driver's negligence was for the jury.—SATINSKY v. MUTUAL BREWING CO., Penn., 40 Atl. Rep. 821.

81. NUISANCES—Private—Burden of Proof.—Defendant kept a warehouse for the storage of oil and gasoline some 240 feet from plaintiff's house. Plaintiff showed that the oil from the tanks percolated the intervening ground so profusely that it interrupted work on a new sewer, and caused a stench near his house which was unendurable. Defendant showed that the odor was trifling, and not obnoxious. Held, that whether it was a nuisance, and the damage therefrom substantial, was for the jury.—GAVIGAN v. ATLANTIC REFINING CO., Penn., 40 Atl. Rep. 834.

82. PLEDGES — Enforcement — Attorney's Fee.—The contract of pledge was made to cover the fee of attorney for professional services rendered by pledgees' attorney in court, and for his services rendered out of court, in all matters appertaining to the securities pledged. The debtor, after it had failed to meet and pay its indebtedness at maturity of its obligation, was indebted for the fee of the creditors' attorney on the amount realized and credited on the pledgees' claim from the sales of the pledged property.—UNION NAT. BANK OF NEW ORLEANS v. FORSYTHE, La., 23 South. Rep. 917.

83. PLEDGES—Rights and Liabilities of Pledgee.—The buyer of property having pledged it, an agreement of the pledgee with the seller that he would not redeliver the property until the balance of the price should be paid was void, as an agreement not to perform the obligation due the pledgor, of delivering up the property on payment of the charge against it.—MOODY V. NEWMARK, Cal., 53 Pac. Rep. 944.

84. PRINCIPAL AND AGENT — Contract Relation.—A contract whereby the owner of a well of mineral water in Europe "abandoned" to a certain corporation the exclusive sale thereof in this country—the corporation to pay him specified prices for the water, and take a specified number of bottles yearly, agreeing to sell no other similar waters—creates the relation of buyer and seller, and not of principal and agent.—SAXLEHNER V. EISNER & MENDELSON CO., U. S. C. C., S. D. (N. Y.), 88 Fed. Rep. 61.

85. PRINCIPAL AND AGENT—Sale by Agent.—If the owner of goods intrusts them to an agent, with authority to sell in his own name without disclosing the name of his principal, and the agent sells in his own name to one who knows nothing of any principal, but honestly believes that the agent is selling on his own account, the purchaser may set off, against the demand of the principal for the price of the goods, any demand which he may have against the agent which arose before notice of the actual ownership of the goods.—BAXTER V. SHERMAN, Minn., 76 N. W. Rep. 211.

86. RAILROAD COMPANY—Consolidation.—Rev. Stat. 1889, § 2567, provides that two or more railroad companies may be consolidated, so as to form one company, which shall own all the property; that new stock for the new company shall issue in lieu of stock in the old companies; that a new corporate name shall be assumed; but that the new company remains liable for all the contracts of the old company. Held to provide for the creation of a "new" corporation, within Const. art. 10, § 21, providing that no corporation shall be organized without the payment of certain fees on or before the filing of the articles of incorporation, since by the consolidation the old companies are dissolved, and a new corporation formed.—STATE V. LESUEUR, Mo., 46 S. W. Rep. 1075.

87. RAILROAD COMPANY—Negligence—Cattle Chutes. —A railroad company is negligent in constructing a cattle chute so close to the track that a brakeman, on the ladder of a passing car, may be struck by it.—WOOD V. LOUISVILLE & N. R. CO., U. S. C. C., W. D. (Tenn.), 88 Fed. Rep. 44.

88. RAILROAD COMPANY — Negligence — Children. — Where a child, seven years of age, went on a track at a railway crossing, in full view of the flagman, while the gates were lowered, it became the duty of the railway company to use care according to the circumstances to prevent injury to the child, its full duty not being done, as to a child, by a mere lowering of the gates.—JONES V. HARRIS, Penn., 40 Atl. Rep. 791.

89. REMOVAL OF CAUSES—Aliens—Naturalization.—A declaration of intention to become a citizen of the United States does not make one a naturalized citizen, nor entitle him to the rights or privileges of citizenship in the State of Washington; and he is, therefore, not a citizen of that State in the meaning of the removal acts.—CREAGH V. EQUITABLE LIFE ASSUR. SOC. OF U. S., U. S. C. C., D. (Wash.), 88 Fed. Rep. 1.

90. REMOVAL OF CAUSES—Time for Removal.—Under the act of 1887 (24 Stat. 554) it is too late to file a petition for removal after the answer day in the State court has passed.—GREGORY V. BOSTON SAFE-DEPOSIT & TRUST CO., U. S. C. C., D. (Mass.), 88 Fed. Rep. 3.

91. REPLEVIN BY CHATTEL MORTGAGEE. —A mortgagee who maintains an action in replevin for the possession of the mortgaged property against attaching creditors of the mortgagor is not bound to protect the interests of an assignee of the mortgagor, although said mortgagee has notice of the assignment.—MARTINDALE V. EVANS, Kan., 53 Pac. Rep. 889.

92. RES JUDICATA—Action on County Bonds.—Where a judgment has been recovered against a county on its refunding bonds, and subsequently *mandamus* has been issued to compel the levy of a tax to pay such bonds, the question of their validity is concluded as between the same parties, and cannot be again raised in a subsequent suit.—MARION COUNTY V. COLER, U. S. C. C. of App., Fifth Circuit, 88 Fed. Rep. 59.

93. SALE—Conditional Sales—Rights of Creditors.—In Pennsylvania a sale and delivery of personal property, with an agreement that the ownership shall remain in the vendor until the purchase price is paid, is void as to creditors of the vendee and innocent purchasers; and this rule applies, whatever the form of the agreement.—RYLE V. KNOWLES LOOM WORKS, U. S. C. C. of App., Third Circuit, 87 Fed. Rep. 976.

94. SALE BY CORPORATION —Ratification by Stockholders.—All the stockholders of a corporation having executed a full, complete and perfect act of ratification of an adjudication at public auction, the same relieves the sale of any and all the alleged illegalities in the proceedings leading up to same, such as want of authority in the board of directors to direct a sale to be made, and that the adjudication was at a price less than a stockholders' meeting had previously authorized to be accepted therefor.—ROBINSON MINERAL SPRING CO. V. DE BAUTTE, La., 23 South. Rep. 865.

95. SLANDER — Pleading — Declaration.—In an action for slander, the rule of pleading to be followed is that the words spoken by the defendant of and concerning the plaintiff must be averred in *hæc verba* in the declaration, in order that the court may determine, either with or without the aid of the innuendo, whether they constitute a ground of action, and also in order that the defendant may know the charge against him, and what defense can be made to the action by pleading and proof.—HOLMES V. WEBSTER, N. J., 40 Atl. Rep. 778.

96. SPECIFIC PERFORMANCE — Action by Assignee of Contract.—The assignee of the vendee in a written contract for the conveyance of lands may enforce specific performance thereof as against the vendor, upon compliance with the terms of such contract. —CRAVER V. SPENCER, Fla., 23 South. Rep. 880.

97. SPECIFIC PERFORMANCE—Indefinite Agreement.— Under Civ. Code, § 3390, subd. 6, providing that no agreement may be enforced, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable, an agreement to continue in testator's employ in consideration of his promise to make good to the employee, by testamentary provision, such amount as the employee would lose by declining an offer of a partner's interest in a competing firm, is not specifically enforceable against testator's executors.—RUSSELL V. AGAR, Cal., 53 Pac. Rep. 926.

98. SUBROGATION—Sureties—Bills and Notes. — In a suit on a note against the indorser, the maker's property was attached, and he caused it to be released by giving the statutory bond. Judgment was entered on the note against maker and indorser, and the attachment surety paid it, and took an assignment of it to himself. His obligation on the bond was only as surety for the maker. Held, that the surety or his assignees having notice could not enforce the judgment against the indorser.—MARCH V. BARNET, Cal., 53 Pac. Rep. 938.

99. TAXATION—Public Purposes.—Acts 1895, p. 278, § 3, providing that every manufacturer of patent medicines shall pay a license, which shall be turned into a fund for maintaining free scholarships in the State university for students without means, is in violation of Const. art. 10, § 3, ordaining that taxes may be levied and collected for public purposes only.—C. F. SIMMONS MEDICINE CO. V. ZIEGENHEIN, Mo., 47 S. W. Rep. 10.

100. TAXATION—Traveling Vendor—License Tax.—A commercial drummer or canvasser, who goes out on the road soliciting orders for his house, whether it be

located in or out of the State, and who takes with him samples of the goods or wares his house deals in, is not a "traveling vendor," within the meaning of section 13 of Act No. 150 of 1890.—PEGUES v. RAY, La., 23 South. Rep. 904.

101. TENANTS IN COMMON—Adverse Possession.—One of two tenants in common, who had leased the land, conveyed his interest. Thereafter the interest of such grantor was sold at execution sale, and at his request his tenant attorned to the purchaser. Held that, as at the time grantor had no interest and his tenant was the tenant of the tenants in common, such attornment, having been made privily, and without the knowledge and consent of the true owners, or either of them, was as to them void.—BENOIST v. ROTHSCHILD, Mo., 46 S. W. Rep. 1081.

102. TRIAL—Disqualification of Juror.—Relationship of a juror, within the prohibited degrees, to the unsuccessful party in a case, although unknown to such party or his counsel until after verdict, is not sufficient ground for a new trial, especially in a case where the verdict was manifestly right.—WRIGHT v. SMITH, Ga., 30 S. E. Rep. 651.

103. TRIAL—Right to Open and Close.—An admission by the defendants in a proceeding to foreclose a negotiable mortgage note that they executed the paper, and that the plaintiff is the owner thereof, entitles them to open and conclude the argument.—SOUTHERN MUT. BLDG. & LOAN ASSN. v. PERRY, Ga., 30 S. E. Rep. 658.

104. TRADE-MARK—Injunction.—Equity recognizes no property right in a trade-mark which is calculated to mislead and deceive the public as to the place where the goods sold under such trade-mark are manufactured. It follows that the words "Old Colony Shoe Company, Rockland, Mass.," used as a trade-mark by the seller of shoes not manufactured at the place named, which was at the time the trade-mark was adopted a place having a reputation for the manufacture of fine shoes, were not such a trade-mark as would be protected by a court of equity. The prior use by the originator would authorize such court neither to enjoin the use of the same deceptive trade-mark by another dealer in the same character of goods, nor to award damages against him for such use.—COLEMAN, BURDEN & WARTHEN CO. v. DANNENBERG CO., Ga., 30 S. E. Rep. 639.

105. TRADE-MARKS AND TRADE-NAMES—Infringement of Labels.—One using a name or mark, which is free to the public, in connection with a label purposely imitating the label of another, which he has the exclusive right to use, for the purpose of utilizing, by the use of the simulated label, the reputation of such other, will be enjoined from a further use of such label, and held to account for previous damages.—SAXLEHNER v. NIELSON, U. S. C. C., E. D. (N. Y.), 88 Fed. Rep. 71.

106. TRADE-NAMES — Descriptive Terms.—The word "nickle" or "nickel," when used in connection with the business of a general merchant who does not buy or sell nickel, and whose wares are not as a rule sold for a nickel (five cents), is not a term descriptive of such business; and hence an exclusive right to use such word in that connection may be acquired.—DUKE v. CLEAVER, Tex., 46 S. W. Rep. 1128.

107. TRUSTS—Enforcement in Equity.—A writing stating that the signer had this day received a deed of a certain farm, which he intended for the benefit of a certain sister and her children, and that he made such memorandum so that, if any accident should happen to him, she would hold the writing as evidence of "my intention as well as of my heirs," which was immediately delivered, together with the deed, to said sister, who went into and has remained in possession of the farm, creates a voluntary trust, enforceable in equity.—CATHCART v. NELSON'S ADMR., Vt., 40 Atl. Rep. 826.

108. USURY—Defense — Pleadings. — The defense of usury is not available unless specially pleaded, and verified by the party seeking to avail himself of it, as required by Rev. Stat. 1895, art. 3107.—FIRST NAT. BANK OF GREENVILLE v. PENMAN, Tex., 47 S. W. Rep. 68.

109. VENDOR AND PURCHASER—Construction of Land Contract.—A contract under seal, by which one party agrees to sell and another agrees to buy certain lands and other property, which provides for delivery of the property and payment therefor, and the deposit of deeds in escrow for delivery upon completion of the payments, is a contract of sale, and not a contract for sale.—BADGER SILVER MIN. CO. v. DRAKE, U. S. C. C. of App., Fifth Circuit, 88 Fed. Rep. 48.

110. WARRANTY—Construction.—A general warranty of title in a deed, against the claims of all persons whatever, covers defects in the title, including liens and incumbrances, though known to the purchaser at the time of the execution of the deed.—OSBURN v. PRITCHARD, Ga., 30 S. E. Rep. 656.

111. WILLS — Abatement of Legacies. — Where the funds in the hands of the administrator are insufficient to pay all the legacies in full, a bequest to a priest to say masses will not thereby abate. — SHERMAN v. BAKER, R. I., 40 Atl. Rep. 765.

112. WILLS—Designation of Beneficiaries.—A devise "to my nephew W R," contains no latent ambiguity, where such a person exists, and parol testimony is inadmissible to show that testator intended his wife's nephew, of the same name.—IN RE ROOT'S ESTATE, Penn., 40 Atl. Rep. 818.

113. WILLS—Execution—Evidence.—The evidence as to the execution of a will proved the signature of testatrix, the signatures of the subscribing witnesses, and the fact that they signed it in her presence and in the presence of each other. No evidence impeaching the execution of the will in any respect was offered. One of the attesting witnesses was dead, however. The other did not remember whether testatrix signed the instrument or acknowledged her signature to it in his presence, or whether she declared it to be her will in the presence of the attesting witnesses, or whether she requested him to sign as an attesting witness, but he did not testify that these things did not take place. Held, that there was sufficient proof of the execution.—IN RE TYLER'S ESTATE, Cal., 53 Pac. Rep. 928.

114. WILLS—Legacies—Scope of Residuary Clauses.—A lapsed legacy of testator's watch, chain, clothing and certain jewelry, does not fall within a residuary clause embracing household goods and effects, including books, pictures, furniture, and the like.—IN RE KIMBALL'S WILL, R. I., 40 Atl. Rep. 847.

115. WILLS—Trusts—Designation of Beneficiaries.—S, after designating the beneficiaries of his will, and setting apart to them each a life estate, provided therein as follows: "After the death of each one, I desire that my executors shall make over to the presiding bishop of the Church of Jesus Christ of Latter-Day Saints the half of my estate from which that wife's income was derived. The presiding bishop shall receive it in trust, to expend the annual interest or income, according to his discretion, for the benefit of the members of the Church of Jesus Christ of Latter-Day Saints, whether it be for public schools, parks, watering cities, acclimatizing foreign plants, or anything else whereby the members may be benefited." Held, that the trustee is clearly designated, and the beneficiaries under the will are sufficiently described.—STAINES v. BURTON, Utah, 53 Pac. Rep. 1015.

116. WITNESS—Deposition—Competency.— The testimony of a physician was taken in a pending action by deposition when he was competent to testify. Held, that the act of June 18, 1895 (P. L. 195), rendering a physician incompetent to testify as to information acquired in a professional capacity, passed subsequent to his deposition and prior to the trial, would not render his deposition incompetent evidence on the trial of the action after his death.—WELLS v. NEW ENGLAND MUT. LIFE INS. CO., OF BOSTON, MASS., Pa., 40 Atl. Rep. 802.